Bank Pertanian Malaysia Bhd v Seiko Marine Products Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-22M-52–04 OF 2016
AZIZAH NAWAWI J
31 OCTOBER 2016

Banking — Banker and customer — Claim for amount outstanding under banking facility — Plaintiff granted Al-Bai Bithaman Ajil financing facility to defendants — Defendants defaulted payment — Plaintiff applied for summary judgment under O 14 of the Rules of Court 2012 — Whether plaintiff fulfilled preliminary requirements for summary judgment application — Whether plaintiff particularise loan payment — Whether amount outstanding proven — Whether there was any triable issue

Civil Procedure — Summary judgment — Action to recover monies loaned — Plaintiff granted Al-Bai Bithaman Ajil financing facility to defendants — Defendants defaulted payment — Plaintiff applied for summary judgment under O 14 of the Rules of Court 2012 — Whether plaintiff fulfilled preliminary requirements for summary judgment application — Whether plaintiff particularise loan payment — Whether amount outstanding proven — Whether there was any triable issue — Rules of Court 2012 O 14

The plaintiff had granted a Al-Bai Bithaman Ajil financing facility ('BBA') to the respondents and upon default in payment by the latter, the plaintiff commenced the present action for summary judgment pursuant to O 14 of the Rules of Court 2012 ('the ROC') to claim for the outstanding sum. In opposing the application, the defendants contended that the plaintiff had failed to particularise the details of the loan payment and further argued that they had paid more than RM1m to the plaintiff. It was also the contention of the defendants that pursuant to cl 7.3 of the guarantee and indemnity agreement ('the guarantee') entered between the plaintiff and the second, third and fourth defendants, the plaintiff must exhibit a statement of account, and that the plaintiff's certificate of indebtedness was not a statement of account. Further, the defendants submitted that the plaintiff should only be entitled to profit up to date of the present suit and not for the full 84 months as claimed by the plaintiff. It was therefore submitted that the accuracy of the profit payable under the agreement could only be determined by a full trial.

Held, allowing the plaintiff's application with costs of RM5,000:

(1) The plaintiff had satisfied the preliminary requirements for application of summary judgment as laid down in the case of *National Company for Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300 that: (a) the statement of claim had been served on the defendants; (b) the defendants had entered appearance; and (c) the affidavit in support is in compliance with O 14 r 2 of the ROC. Therefore, the burden was then shifted to the defendants to satisfy the court why judgment should not be entered against them (see para 16).

(2) Failure to particularise the loan payment was not a triable issue. The plaintiff had filed an affidavit affirmed by one Charles Francis Donough on 4 July 2016 to show that the payments made by the defendants had been taken into consideration. With regards to the alleged RM1m repayments made, without any proofs, it was nothing but a bare assertion (see para 22).

(3) The plaintiff's claim was supported by the certificate of indebtedness which was a prima facie evidence of the sum owing. The onus then lay with the defendants to disprove the amount claimed. However, the defendants did not disprove the amount claimed, as the defendants did not file any documents to support its claim that RM1m repayment had been made (see para 23).

(4) There was nothing in the facilities agreement to state that non-compliance with cl 7.13 of the guarantee was fatal to the plaintiff's claim. The issue of the certificate of indebtedness and the statement of account was an issue of format and merely an additional support to the plaintiff's claim hence, there was no triable issue (see para 25).

(5) The rebates would only be released if there was a full settlement of the BBA facility, in which case the defendants were not entitled to due to the defaults by the defendants. In conclusion, based on the above reasons, the defendants had failed to raise any triable issue (see paras 27–28).

[Bahasa Malaysia summary

Plaintif telah memberikan satu kemudahan Al-Bai Bithaman Ajil ('BBA') kepada responden dan atas keingkaran bayaran oleh responden, plaintif telah memulakan tindakan ini untuk penghakiman ringkas menurut A 14 Kaedah-Kaedah Mahkamah 2012 ('KKM') untuk menuntut baki tertunggak. Dalam menentang permohonan, defendan menegaskan bahwa plaintif gagal untuk memberikan butiran bayaran pinjaman dan seterusnya menghujahkah bahawa mereka telah membayar lebih daripada RM1 juta kepada plaintif. Adalah hujahan defendan bahawa menurut klausa 7.3 perjanjian jaminan dan indemniti ('jaminan') yang dimasuki antara plaintif dan defendan kedua, ketiga dan keempat, plaintif hendaklah melampirkan satu penyata akaun, dan bahawa sijil hutang plaintif bukanlah satu penyata akaun. Selanjutnya defendan mengemukakan bahawa plaintif sepatutnya hanya berhak terhadap

keuntungan sehingga tarikh guaman ini dan bukan untuk 84 bulan penuh seperti yang dituntut oleh plaintif. Oleh itu ia adalah dikemukakan bahawa ketepatan keuntungan yang boleh dibayar di bawah perjanjian hanya boleh ditentukan dengan perbicaraan penuh.

Diputuskan, membenarkan permohonan plaintif dengan kos sebanyak RM5,000:

(1) Plaintif telah memenuhi kehendak permulaan untuk permohonan penghakiman ringkas seperti yang dikemukakan dalam kes *National Company for Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300 bahawa: (a) satu penyata tuntutan telah diserahkan kepada defendan; (b) defendan telah memasukkan kehadiran; dan (c) afidavit sokongan mematuhi A 14 k 2 KKM. Maka, beban kemudian beralih kepada defendan untuk memuaskan mahkamah mengapa penghakiman tidak sepatutnya dimasukkan terhadap mereka (lihat perenggan 16).

(2) Kegagalan untuk memberi butiran bayaran pinjaman bukanlah satu isu yang boleh dibicarakan. Plaintif kemudian telah memfailkan afidavit yang disahkan oleh seorang bernama Charles Francis Donough pada 4 Julai 2016 untuk menunjukkan bahawa bayaran telah dibuat oleh defendan telah diambil kira. Berkaitan dengan pembayaran RM1 juta yang dikatakan telah dibuat, tanpa apa-apa bukti, adalah hanya satu kenyataan kosong (lihat perenggan 22).

(3) Tuntutan plaintif disokong dengan sijil hutang yang mana adalah keterangan prima facie jumlah terhutang. Tanggungjawab terletak dengan defendan untuk menyangkal jumlah dituntut. Walau bagaimanapun, defendan tidak menyangkal jumlah dituntut, memandangkan defendan tidak memfailkan apa-apa dokumen untuk menyokong tuntutannya bahawa bayaran semula RM1 juta telah pun dibuat (lihat perenggan 23).

(4) Tiada apa di dalam perjanjian kemudahan untuk menyatakan ketidakpatuhan dengan klausa 7.13 jaminan adalah fatal terhadap tuntutan plaintif. Isu sijil hutang dan penyata akaun adalah satu isu format dan hanyalah sokongan tambahan terhadap tuntutan plaintif maka, tiada isu yang boleh dibicarakan (lihat perenggan 25).

(5) Rebat akan hanya dilepaskan jika terdapat penyelesaian penuh kemudahan BBA, yang mana dalam kes ini defendan tidak berhak disebabkan keingkaran oleh defendan. Kesimpulannya berdasarkan alasan di atas, defendan telah gagal untuk membangkitkan apa-apa isu yang boleh dibicarakan (lihat perenggan 27–28).]

Notes

For a case on claim for amount outstanding under banking facility, see 1(2) *Mallal's Digest* (5th Ed, 2015) para 2461.

Cases referred to

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400; [1992] 1 CLJ 627, SC (refd)

Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor [2006] 2 MLJ 685, FC (refd)

National Company for Foreign Trade v Kayu Raya Sdn Bhd [1984] 2 MLJ 300; [1984] 2 CLJ 220, FC (folld)

RHB Bank Bhd v Tan Swee Long Holdings Sdn Bhd & Ors [2008] 3 MLJ 130; [2008] 10 CLJ 519, HC (refd)

Legislation referred to

Rules of Court 2012 O 14

Tai Wei Jeat (Raja, Darryl & Loh) for the plaintiff.
N Devan (Devan & Assoc) for the defendants.

Azizah Nawawi J:

APPLICATION

[1] Enclosure 5 is the plaintiff's application for summary judgment under O 14 of the Rules of Court 2012, to be entered against the defendants for the sum of RM5,598,318.94 being the sum due and owing under the Al-Bai Bithaman Ajil financing facility ('the BBA facility'), *ta'widh* on the said sum at the rate of 1%pa calculated from 10 March 2016 until the date of the judgment and/or the date of maturity of the facility and thereafter at the Interbank Islamic Money Market rate until the date of full settlement.

[2] Having considered the application and the submission of the parties, this court has allowed the plaintiff's application for summary judgment with costs.

THE SALIENT FACTS

[3] The plaintiff is a licensed financial institution incorporated in Malaysia. The first defendant, a private limited company is the borrower under the facility agreement while the second to the fourth defendants are directors of the first defendant and also the guarantors under the facility agreement.

[4] At the defendants' request, the plaintiff had via a letter of offer dated 2 August 2010 (the letter of offer dated 2 August 2010) agreed to grant the

BBA facility in the sum of RM4,500,000 in accordance with Syariah principles to the first defendant.

[5] Pursuant to the principle of Al-Bai Bithaman Ajil, the first defendant has executed an asset purchase agreement dated 27 August 2010 ('APA dated 27 August 2010') and an asset sale agreement dated 27 August 2010 ('ASA dated 27 August 2010') ('the facilities agreement'), whereby the terms and conditions are as follows:

(a) in consideration of the first defendant's acceptance of the BBA facility and to make repayment in accordance with the agreement, the plaintiff purchased Certificate No 020418 of Agro Investment-I ('the asset') for RM4,500,000;

(b) the plaintiff sold the asset to the first defendant at the total sale price of RM6,423,552.24 ('the sale price') which included the profit margin;

(c) the first defendant is to pay the sale price in installments after the first release of the BBA facility, in the sum of RM73,501 per month until the 83rd month and a sum of RM73,480.60 per month until full payment;

(d) that the first defendant is to pay security deposit of RM82,353, which the plaintiff could utilise to set off the indebtedness under the agreement; and

(e) that upon demand and/or an event of default by the first defendant, the BBA facility shall become immediately payable to the plaintiff, and the plaintiff shall be entitled to exercise all its rights and remedies against the first defendant.

[6] In consideration of the plaintiff granting the BBA facility to the first defendant, and as security for the BBA facility, the second, third and fourth defendants ('the guarantors') who are at all material times the directors of the first defendant have executed a guarantee and indemnity agreement dated 27 August 2010 ('the guarantee') in favour of the plaintiff.

[7] Under the guarantee and indemnity, the guarantors would make payment on the plaintiff's demand and agreed to their liability as principal debtors and not merely as sureties.

[8] The defendants also agreed to accept the plaintiff's statement of account in writing showing the indebtedness of the first defendant as binding and conclusive proof of their debt.

[9] The BBA facility was fully disbursed and utilised by the first defendant. Sometime in 2011, the security deposit was uplifted by the plaintiff as

repayment towards the outstanding BBA facility. Despite the upliftment and reimbursement, in middle of the year 2011, and in breach of the agreement, the first defendant has failed, neglected to reimburse the security deposit. The first defendant had also defaulted in the repayment of the outstanding BBA facility.

[10] Following the event of default, upon the defendants' request, the plaintiff agreed to reschedule the repayment of the outstanding BBA facility in terms contained in the plaintiff's letter dated 22 November 2012 for repayment as follows:

(a) ten monthly installment payments of RM25,000 per month from November 2012–August 2013;

(b) 49 monthly payments of RM75,000 per month September 2013–September 2017, which was the maturity date of the BBA facility; and

(c) that subject to due payment thereof, the balance outstanding selling price estimated at RM1,940,926.04 would be refinanced upon terms and conditions to be agreed between the plaintiff and the first defendant.

[11] The first defendant had subsequently defaulted in making repayment promptly pursuant to the BBA facility.

[12] The plaintiff then commenced an action against the defendants vide Shah Alam High Court Suit No 22NCVC-495–07 of 2013 to recover the sums owing under the BBA facility. At the defendants' request and as a gesture of goodwill, the plaintiff withdrew the action on 31 December 2013 with liberty to file afresh to enable the defendants to repay the outstanding BBA facility through a proposed investment arrangement.

[13] Despite the extended indulgence, there was no viable proposal for the repayment of the outstanding BBA facility forthcoming.

[14] Despite receiving several notices of demand, the defendants failed to settle the outstanding sums due and owing to the plaintiff under the BBA facility, in the sum of RM5,598,318.94 as at 9 March 2016.

THE FINDINGS OF THE COURT

[15] In an application for summary judgment, this court is guided by the principles laid down in *National Company for Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300; [1984] 2 CLJ 220, where it was stated by the Federal Court as follows:

> ... We think it appropriate to remind ourselves once again that in every application under O 14, the first considerations are (a) whether the case comes within the order and (b) whether the plaintiff has satisfied the preliminary requirements for proceeding under O 14. For the purposes of an application under O 14, the preliminary requirements:
>
> (i) the statement of claim must have been served on the defendant;
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> (ii) the defendant must have entered an appearance;
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> (iii) the affidavit in support of the application must comply with the requirements of r 2 of the O 14
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> ... If the plaintiff fails to satisfy either of these considerations, the summons may be dismissed. If however, these considerations are satisfied, the plaintiff will have established a prima facie case and he becomes entitled to judgment. This burden then shifts to the defendant to satisfy the court why judgment should not be given against him ...

[16] In the present case, the plaintiff had satisfied the preliminary requirements as laid down in the *Kayu Raya*'s case that is:

(a) the statement of claim have been served on been served on the defendants;

(b) the defendants have entered appearance; and

(c) the affidavit in support is in compliance with O 14 r 2 of the ROC 2012.

Therefore, the burden is then shifted to the defendant to satisfy the court why judgment should not be entered against them.

[17] In *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400; [1992] 1 CLJ 627 the Supreme Court held that the duty of a judge does not end as soon as the fact is asserted by one party, or denied or disputed by the other on affidavit. The judge has a duty to reject such assertion or denial if such assertion or denial is equivocal or lacking in precision or is inconsistent with undisputed contemporary documents or is inherently improbable. The court will have to identify the issues of fact or law and to determine whether they are triable.

[18] The defendants have submitted that the following issues are triable issues and the plaintiff's application must be dismissed with costs:

(a) that the plaintiff failed to particularise the details of the loan payment and the extra sum imposed on the first defendant nor have the plaintiff pleaded the details of the first defendant's default payment in the statement of claim;

(b) that the plaintiff has failed to adduce the statement of account that could be accepted by the court on the amount owing. It is the defendants' submission that exh 'CBD8' is not a statement of account in accordance to cl 7.13 of the guarantee as there is no details of debits and credits on it; and

(c) that the sale price of RM6,423,552.24, is inclusive the calculated profit for a term of 84 months and the plaintiff in the present suit is claiming the entire sum. It is the defendants' submission that the plaintiff should only be entitled to profit up to the date of this suit and not for the full 84 months. Accuracy of the profit payable under the agreement could only be determined by a full trial.

[19] Having considered the application, the affidavits and the submission of the parties, I find that the defendant has failed to raise any triable issue. The defendants have signed the facilities agreement and have also utilised the loans given, but have simply failed to make the repayment, despite the extended indulgence given by the plaintiff since 2012/2013.

[20] The first issue raised by the defendants is that the plaintiff has failed to particularise the details of the loan payment. I am of the considered opinion that failure to particularise the loan payment is not a triable issue.

[21] However, in para 15 of the defendants' affidavit, the defendants made an assertion that they have paid more than RM1m and that the deponent 'sedang mendapatkan bukti pembayaran yang akan saya eksibitkan dalam affidavit lanjutan'. Despite this, the defendant did not file any 'afidavit lanjutan'.

[22] On the other hand, the plaintiff has responded by filing an affidavit affirmed by Charles Francis Donough on 4 July 2016 to show that the payments made by the defendants, as can be seen from exhs 'CFD9' and 'CFD10', have been taken into consideration, apart from the utilisation of the security deposits. As such, I find that the plaintiff has shown that the plaintiff has taken into consideration the payments made by the plaintiff. On the alleged RM1m repayments made, without any documents as promised, it is nothing but a bare assertion.

[23] The plaintiff's claim for RM5,598,318.94 as at 9 March 2016 is also supported by the certificate of indebtedness. Therefore, pursuant to the case of *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* [2006] 2 MLJ 685, I am of the considered opinion that the certificate of indebtedness is prima facie evidence of the sum owing. The onus then lies with the defendant to disprove the amount claimed. However, the defendant did not disprove the

amount claimed, as the defendants did file any documents to support its claim that RM1m repayment has been made.

[24] However, it is the contention of the defendants that pursuant to cl 7.13 of the guarantee, the plaintiff must exhibit a statement of account, and that the plaintiff's certificate of indebtedness is not a statement of account.

[25] I am of the considered opinion that even if there is merit in this argument, it is still not a triable issue as it is only an issue of format. There is nothing in the facilities agreement to state that non compliance with cl 7.13 of the guarantee is fatal to the plaintiff's claim. The issue of the certificate of indebtedness and the statement of account is merely an additional support to the plaintiff's claim. In this case, the defendant did not offer any evidence at all to show that the sum claimed is not correct. The defendants have promised to exhibit the documents have failed to do so. In *RHB Bank Bhd v Tan Swee Long Holdings Sdn Bhd & Ors* [2008] 3 MLJ 130; [2008] 10 CLJ 519, the court held it is not enough for the defendants to merely deny the amount owed, 'but the defendants must plead any salient and relevant facts which negative the existence of the debt or which show that the claim is not maintainable on other grounds'.

[26] The last issue raised by the defendants is that the sale price of RM6,423,552.24, is inclusive of the calculated profit for a term of 84 months and the plaintiff in the present suit is claiming the entire sum. It is the defendants' submission that the plaintiff should only be entitled to profit up to the date of this suit and not for the full 84 months. Accuracy of the profit payable under the agreement could only be determined by a full trial.

[27] However, I agree with the plaintiff that the rebates will only be released if there is a full settlement of the BBA facility, in which case the defendants are not entitled to due to the defaults by the defendants. This is pursuant to the contract obligations of parties under the ASA dated 27 August 2010, under clause of 'The Second Schedule' which provides:

> ... The Bank would give a monthly rebate which represents the difference between the Ceiling Profit Rate and Effective Profit Rate. However total rebate will only be accumulated and provided to the Customer upon full settlement of the BBA Facility,

CONCLUSION

[28] In the premise, and based on my reasons enumerated above, I find that the defendant has failed to raise any triable issue and the plaintiff's application is allowed with cost of RM5,000.

Plaintiff's application allowed with costs of RM5,000.

Reported by Dzulqarnain Ab Fatar